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RECORD OF ORAL HEARING  
UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

*Ex parte* HIDEAKI SAKAI,  
JUN KOHORI,  
and MASAHIRO KATADA

Appeal 2008-3130  
Application 10/083,387  
Technology Center 1700

Oral Hearing Held: Thursday, August 14, 2008

Before BRADLEY R. GARRIS, CHUNG PAK, PETER KRATZ,  
Administrative Patent Judges

ON BEHALF OF THE APPELLANT:

RICHARD L. CHINN, Ph.D., ESQ.  
OBLON SPIVAK McCLELLAND MAIER & NEUSTADT, P.C.  
1940 Duke Street  
Alexandria, Virginia 22314

ALSO PRESENT:  
MITSUYUKI KUBO

1           The above-entitled matter came on for hearing on Thursday,  
2   August 14, 2008, commencing at 2:48 p.m., at the U.S. Patent and  
3   Trademark Office, 600 Dulany Street, 9th Floor, Alexandria, Virginia,  
4   before Jennifer M. O'Connor, Notary Public.

5           THE CLERK: Calendar number 33, Mr. Chinn.

6           JUDGE GARRIS: Good afternoon, Mr. Chinn.

7           MR. CHINN: Good afternoon.

8           JUDGE GARRIS: Sir, as you know, you have about 20  
9   minutes. Before you begin, would you care to introduce your guest?

10          MR. CHINN: I have brought with me Mr. Mitsuyuki Kubo.  
11   He's a representative of the assignee.

12          JUDGE GARRIS: Mr. Kubo, welcome to the board, sir.

13          MR. CHINN: He actually joined our office about two months  
14   ago and will be with us for about a period of three years and he wishes to  
15   observe the proceedings.

16          JUDGE GARRIS: Excellent.

17          MR. CHINN: It actually may have been about two months ago  
18   that the five of us all gathered together for a similar appeal.

19          JUDGE GARRIS: We do recall that.

20          MR. CHINN: I didn't get slammed last time, so I'm hoping for  
21   his good luck charm. I'm here to talk about diglyceride oil in instant fried  
22   noodles. And I know for all of us here, it's been a long time since we've  
23   lived on instant fried noodles, but it really is a staple of college students and  
24   they tend to thrive on it. And once you get past the high sodium and the  
25   high fat, it's pretty good for you.

1 But one of the problems with instant fried noodles is that they're  
2 deep fried, and people being concerned about their fat intake, we are looking  
3 to reduce the choleric intake and the obvious detriments of oil consumption  
4 by making instant fried noodles in diglyceride oils. Unfortunately,  
5 sometimes when you use diglyceride oils you can get a reduction in the  
6 texture of the instant fried noodles. We have discovered that when you use a  
7 diglyceride content of at least 60 wt.%, that you are able to get instant fried  
8 noodles which have very good -- a smoothness and texture upon  
9 reconstitution.

10 So this is principally a selection invention in terms of the  
11 diglyceride content of a diglyceride oil in the manufacture of instant fried  
12 noodles. We have two references or principally, one that chose the  
13 manufacture of instant fried noodles in oil in general. We have a secondary  
14 reference, *Gotoh*, which teaches a diglyceride oil for general purpose.

15 I think the oil content -- or the diglyceride content for the *Gotoh*  
16 oil can range anywhere from 40 percent and above, maybe up to 90 percent.

17 But they do not prepare instant fried noodles, and therefore, we have the  
18 selection in terms of the improved texture and elasticity due to the selection  
19 of a diglyceride oil having at least 60 wt.% of diglycerides in the  
20 manufacture of instant fried noodles.

21 We have submitted data to the examiner toward this regards and  
22 unfortunately, the examiner could never get past her belief that there was  
23 motivation to combine and that's why we're here.

24 JUDGE GARRIS: We reviewed the record and we understand  
25 that the examiner has looked at your declaration evidence but seems to feel

1 that there are some issues with respect to it. She seems to -- the examiner  
2 seems to feel as though there's -- it's unclear exactly how the parameters that  
3 you're looking at in this declaration, the smoothness and elasticity, exactly  
4 how they're evaluated in such a way that it is other than subjective.

5 MR. CHINN: And I think we address that issue in our reply  
6 brief, but the evaluation criteria are provided in the Kohori declaration,  
7 which as to the smoothness texture and elasticity, there are gradations of  
8 very smooth, smooth, rather smooth and rough for the smoothness, very  
9 elastic, rather elastic, small elastic, noodle snap, no elastic for the elasticity.

10 JUDGE GARRIS: I saw that and of course, I guess sample 2  
11 would represent the broad claimed invention?

12 MR. CHINN: Correct.

13 JUDGE GARRIS: And sample 3 might represent the --

14 MR. CHINN: It's comparison. I won't concede that it's in the  
15 prior art, but it's for comparative reasons.

16 JUDGE GARRIS: It would be relevant to the *Gotoh* teaching  
17 of using at least 40 percent to the diglyceride. And so as between those two  
18 samples, looking at the smoothness or texture parameter, yours is B and the  
19 comparative sample is C?

20 MR. CHINN: Correct.

21 JUDGE GARRIS: So it's a difference between smooth and  
22 rather smooth, and I think that's what the examiner has in mind. And the  
23 examiner says it seems subjective, no objective criteria for evaluating when  
24 it's smooth as opposed to rather smooth. Can't really tell. Some people

1 might think it's smooth on this particular noodle surface. Others might think  
2 it's only rather smooth.

3 MR. CHINN: If it had been merely a quantitative good versus  
4 better, it is clear that B is better than C and that those assessors can  
5 distinguish between B and C. The fact that it's articulated in words is  
6 probably secondary to the fact that the differences can be determined. And  
7 if you want to call it smooth, rather smooth, somewhat smooth, it is still  
8 evident that there is a discernable difference.

9 JUDGE GARRIS: Do we have -- do we know from this  
10 declaration what people -- I can't tell if it's a single person or a group of  
11 people that may have been making these judgments; do you happen to  
12 know?

13 MR. CHINN: There is -- that is not articulated in the  
14 declaration and I cannot elaborate for you the specific details of the test  
15 conditions. I can point you to page seven of Mr. Kohori's declaration in  
16 which he summarizes that the data provide the demonstration that the  
17 noodles and method for making it superior to those noodles and methods  
18 using less than 50 percent of diglyceride.

19 That should provide some level of comfort in the interpretation  
20 of the data. The examiner really has come up with no reasons to attack the  
21 data other than some issues were not clear for her. But I believe the  
22 summary should take care of that.

23 JUDGE GARRIS: Mr. Chinn, is there anything else you'd like  
24 us to concentrate on?

1                   MR. CHINN: If you have any issues as to scope, I would note  
2     that we have separately argued groups two and three. I think it's claims 3  
3     and 4 in which the diglyceride content increases. Then noting our sample 1  
4     in which we have the highest diglyceride content and you would be dealing  
5     then with the highest level of smoothness detection of very smooth and very  
6     high as compared with rather smooth and small elastic, and then we can deal  
7     with more discernible differences.

8                   JUDGE GARRIS: Okay, sir. Judge Pak, did you have any  
9     questions? Judge Kratz, no further questions? We're finished for the day  
10    then. Thank you very much Mr. Chinn.

11                  MR. CHINN: Thank you very much.

12                  JUDGE GARRIS: Mr. Kubo, thank you.

13                  Whereupon, at 2:57 p.m., the proceedings were concluded.  
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